Supreme Court, U.S.
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No. 98-777

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF SOUTHFIELD; NICK BANDA;
and KATHERINE PEACOCK,

Petitioners,

vs.

ROOSEVELT REESE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the Court of Appeals found that Defendants failed to proffer **any** legitimate nondiscriminatory reason for their actions, does the inquiry end obviating this Court's need to consider the application of *St. Mary's Honor Center v. Hicks*?

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CITATIONS OF OPINIONS AND ORDERS

The Defendants (Petitioners) failed to attach the entire Opinion of the United States Court of Appeals for the Sixth Circuit to their Appendix. The Defendants added a portion of their brief for writ of certiorari into the Court of Appeals Opinion. The Defendants also failed to attach the entire transcript of the decision of the United States District Court for the Eastern District of Michigan. The decision was made at the hearing of Defendants' Motion for Summary Judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Defendants failed to list the proper Michigan statutory provision involved in this case. The proper statutory provision involved is the Michigan's Elliott-Larsen Civil Rights Act, Michigan Compiled Laws 37.2302, *et seq.*, which provides in relevant part:

> Sec. 302. Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

Defendants also failed to provide this Court with the Michigan's Constitutional provision, pertaining to equal protection, Constitution of the State of Michigan, Article I, Section 2, which provides in relevant part:

> Sec. 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

The remaining provisions involved in this case are accurately reflected in Defendants' petition.

STATEMENT OF THE CASE

This is a racial discrimination case. Plaintiff-Respondent, Roosevelt Reese, an African-American, is a successful developer of day care centers and foster care homes in the Metropolitan Detroit area. Mr. Reese had several day care centers in Detroit. In April of 1992, Mr. Reese identified a property in the City of Southfield which was well suited for a day care center. It had adequate parking and was appropriately zoned for usage as a day care center. Mr. Reese's real estate agent, Helen Harper, made an offer for the property. The offer was contingent upon the property being approved for use by the City of Southfield as a day care center. Seller accepted the offer.

Mr. Reese then went to the City of Southfield Planning Department to apply for use of the property. At the Planning Department counter, he asked the Caucasian clerk what was needed to open a day care center on property in the City of Southfield. Rather than giving Mr. Reese an application, the clerk called Defendant Katherine Peacock, an assistant planner, to talk with Mr. Reese. When Mr. Reese asked the same question to Ms. Peacock, also a Caucasian, she went to get the planning director, Defendant Nick Banda, also a Caucasian.

Reese asked the same question to Mr. Banda. Rather than giving Mr. Reese an application, Defendants Banda and Peacock set a meeting for the next week. In the interim, Peacock made a site visit. The meeting was attended by Mr. Reese, his daughter Linda Mathis who administers his centers, Banda and Peacock. Mr. Reese showed Banda and Peacock photographs of his successfully operating centers. Rather than giving Mr. Reese an application, Defendants insisted that in order to proceed, Mr. Reese must purchase the adjacent property. This would add about $28,000 to the cost. There was no way Banda would recommend approval absent Mr. Reese's acquisition of the adjacent property for parking. Banda promised to "fight it all the way." Banda informed Mr. Reese that there was federal money available to demolish the building. Mr. Reese and Mrs. Mathis left the meeting and set out to acquire the adjacent property as directed by Defendants.

After extended negotiations with the owner of the adjacent property, Mr. Reese reported by telephone to Banda that he could buy the property if the City would demolish the building. Banda then stated that the federal funds were not available. Mr. Reese's subsequent calls to Banda and Peacock went unanswered and unreturned.

Discouraged, Mr. Reese had his earnest money deposit refunded. The entire process had taken almost a year.

In 1995, Mr. Reese noticed that Sunrise Day Care Center had opened at the exact location he had sought to have approved. The adjacent property had not been acquired. Sunrise Day Care Center had gone through the entire approval process in six weeks, from start to finish. Sunrise Day Care Center is owned and operated by a Caucasian. Mr. Reese thereafter filed a seven count complaint against the City of Southfield, Nick Banda and Katherine Peacock for: 1) violation of his civil rights under

42 U.S.C. § 1983; 2) violation of 42 U.S.C. § 1981; 3) violation of 42 U.S.C. § 1985(3); 4) deprivation of equal protection under the Fourteenth Amendment of the United States Constitution and violation of Michigan Constitution 1963 Article 1, Section 2; 5) violation of Michigan Elliott-Larsen Civil Rights Act; 6) tortious interference with a contractual relationship, prospective business and/or economic advantage; and 7) conspiracy to tortiously interfere with Plaintiff's contractual relationship, prospective business and/or economic advantage.

Mr. Reese made a request for interrogatories and production of documents. Defendants filed evasive and unresponsive answers. In an effort to comply with FRCP 37(2)(a), Mr. Reese granted Defendants an extension to respond to his discovery requests by March 31, 1997. Defendants filed a motion for summary judgment on March 17, 1997, the last day to file motions.

Mr. Reese received Defendants' responses on April 1, 1997 and filed a response to Defendants' summary judgment motion on April 10, 1997. On April 22, 1997 a hearing was held on Defendants' motion and this Court granted Defendants' motion for summary judgment, dismissing the entire case. On May 30, 1997, an order was entered granting the Defendants' motion. On June 20, 1997, Mr. Reese timely filed his Notice of Appeal of the District Court's order.

On August 13, 1998, the Court of Appeals reversed the District Court's Order and remanded this case for further proceedings. The Court of Appeals held that:

1) the evidence proffered by Reese at the summary-judgment stage was sufficient to satisfy his burden under the *McDonnell Douglas* standard (Appendix, at pg. 1a);

2) Reese stated a prima facie case of discrimination (*Id.*, at pg. 9a);

3) the Defendants failed to provide a nondiscriminatory explanation for their failure to give Mr. Reese an application (*Id.*, at pg. 10a);

4) the intra-corporate conspiracy doctrine does not provide a basis for dismissing Reese's claim under 42 U.S.C. 1985 at the summary-judgment stage (*Id.*, at pg. 11a);

5) since Defendants provided incomplete and evasive responses to Reese's discovery requests relevant to the "custom or policy" inquiry, it would be unfair to say that there is no dispute as to an alleged custom or policy furthering discrimination in Southfield municipal agencies (*Id.*, at pg. 12a);

6) the qualified immunity doctrine outlined in *Harlow v. Fitzgerald* does not dispose of Reese's claims against Banda and Peacock; qualified immunity also does not extend to Reese's claims against Banda and Peacock in their individual capacities (*Id.*, at pg. 13a); and

7) Reese is free to pursue his counts of tortious interference with business relationships on remand (*Id.*, at pg. 14a).

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE DEFENDANTS MISSTATE THE HOLDING OF THE COURT OF APPEALS AND ALL CIRCUITS AGREE THAT WHERE THE DEFENDANTS FAIL TO PROFFER ANY LEGITIMATE NONDISCRIMINATORY REASON FOR THEIR ACTIONS, THE INQUIRY ENDS AND PLAINTIFF HAS SATISFIED HIS BURDEN TO DEFEAT SUMMARY JUDGMENT.

The Defendants (Petitioners) base their petition for writ of certiorari on their allegation of the inadequacy of the Court of Appeals holding that the Defendants' proffered reason for the challenged action is false. Defendants contend that the Plaintiff must do more to defeat summary judgment.

The Defendants misstate the holding of the Court of Appeals. Their argument is flawed. The Court of Appeals held that the Defendants failed to offer *any* legitimate nondiscriminatory reason for the challenged action.

The Court of Appeals applied the *McDonnell/Burdine* framework and determined that Plaintiff easily proved his prima facie case (Appendix, page 9a). The Defendants also concede that the Plaintiff has established his prima facie case (Petition for Writ of Certiorari, page 16). The next step was for the Defendants to offer a legitimate nondiscriminatory reason for their actions. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-56, 101 S. Ct. 1089, 1094-96, 67 L. Ed. 2d 207 (1981). If the defendants satisfied the requirement, the burden would shift to the plaintiff to prove that their reasons

are pretextual. However, ~~if~~ the Defendants failed to offer a legitimate nondiscriminatory reason for their actions, the inquiry ends and the plaintiff survives summary judgment. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05, 93 S. Ct. 1817, 1827-28, 36 L. Ed. 2d 668 (1973).

In the instant case, the Court of Appeals rejected Defendants' ambiguous nondiscriminatory explanation, holding that Defendant' attempted explanation was vacuous.

> **In short, it is not a "legitimate nondiscriminatory explanation" to say that Reese never filed a site plan application, when his theory of discrimination is that the city discriminated against him by failing to provide the application in the first place, despite his repeated requests for the necessary information.** (Appendix. pg. 10a) (Emphasis added).

By determining that the Defendants' attempted explanation comprised no explanation at all, the Court of Appeals, in essence, held that the Defendant's failed to satisfy their burden of production and the inquiry ended there for summary judgment purposes.

Because the Defendants failed to proffer *any* legitimate nondiscriminatory explanation for their actions, their motion for summary judgment would fail in any court in any circuit. All circuits agree that the defendants must respond to a plaintiff's prima facie case with a legitimate nondiscriminatory reason for their actions. *Combs v. Meadowcraft, Inc.*, 106 F.3d 1519 (11th Cir. 1997)

> *Under the McDonnell Douglas framework, if a plaintiff establishes a prima facie case, and the*

> *defendant employer proffers no nondiscriminatory reasons for the action, it is settled that the plaintiff wins judgment as a matter of law. Burdine, 450 U.S. at 253, 101 S. Ct. at 1093- 94. Hopefully, no one would suggest that in such a case the defendant might be entitled to a judgment as a matter of law.* Yet, those who argue against the Howard line of decisions are advocating a position that is not much more logically defensible than that. Given the establishment of a prima facie case in each, the case in which an employer puts forward nothing but false reasons is too analytically close to the case in which the employer puts forward no reasons for the law to permit judgment as a matter of law to be entered for opposite sides in the two cases. Stated somewhat differently, why should the law reward so handsomely mendacity in legal proceedings? (*Combs*, 106 F.3d at 1537, emphasis added).

The Defendants argument for a writ of certiorari is that clarification is needed as to whether a plaintiff satisfies his burden of defeating summary judgment by establishing that the proffered reason for the challenged action is false.

First, the Defendants' argument assumes that they have met their burden of production. The Court of Appeals held they did not. The inquiry ends and there is no reason for this Court to evaluate this case according to the Defendants' argument. No clarification is needed when a defendant fails to satisfy its burden of production. The law is clear that when such is the case, coupled with plaintiff's proof of a prima facie case, the plaintiff defeats summary judgment. (*See Combs v. Meadowcraft, Inc.*, 106 F.3d 1519, 1537 (11th Cir. 1997); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)).

Secondly, it is settled law that when the plaintiff has discredited the defendant's proffered reason, summary judgment is improper. *Barbour v. Merrill*, 310 U.S. App. D.C. 419, 48 F.3d 1270 (D.C. Cir.), *cert. granted in part*, 116 S. Ct. 805 (1996), *cert. dismissed*, 116 S. Ct. 1037 (1996); *Kolstad v. American Dental Association*, 108 F.3d 1431 (D.C. Cir. 1997), *rehearing in part granted on other grounds*, (May 28, 1997) (Nos. 96-7030, 96-7047) (a factfinder may infer discrimination based upon the combination of the plaintiff's prima facie case and the plaintiff's presentation of evidence sufficient to "discredit" the employer's proffered nondiscriminatory reasons for its challenged action, and concluded that, under Hicks, a defendant's motion for judgment as a matter of law must not be granted when the plaintiff has presented such evidence.); *Kolstad,* 108 F.3d at 1436-37 (*quoting Barbour,* 48 F.3d at 1277). *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997) ("Based on the Supreme Court's clear statement in the majority opinion in Hicks, read together with the rationale of the dissenting justices, we understand the Hicks Court to have been unanimous that disbelief of the defendant's proffered reasons, together with the prima facie case, is sufficient circumstantial evidence to support a finding of discrimination. Therefore, it follows from Hicks that a plaintiff is entitled to survive summary judgment, and judgment as a matter of law, if there is sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action."); *Sheridan v. E.I. DuPont de Nemours and Co.,* 100 F.3d 1061, 1067 (3d Cir. 1996) (*en banc), petition for cert. filed*, 65 U.S.L.W. 3571 (U.S. Feb. 3, 1997) (No. 96-1231) ("[A] plaintiff may survive summary judgment . . . if the plaintiff produced sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action."); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) ("If the plaintiff succeeds in

showing a prima facie case and presents evidence that the defendant's proffered reason for the employment decision was pretextual — *i.e.*, unworthy of belief, the plaintiff . . . is entitled to go to trial."); *Perdomo v. Browner*, 67 F.3d 140, 145 (7th Cir. 1995) ("Because a fact-finder may infer intentional discrimination from an employer's untruthfulness, evidence that calls truthfulness into question precludes a summary judgment."); *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (vacating a grant of judgment as a matter of law to the defendant, on the ground that the plaintiff had presented sufficient evidence to permit a reasonable factfinder to "reject [the] defendant's proffered reasons for [the] challenged employment action and thus [to make] the ultimate inference of discrimination."); *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) (*quoting Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1109 (8th Cir.), *cert. denied*, 513 U.S. 946, 130 L. Ed. 2d 310, 115 S. Ct. 355 (1994)); *Gaworski*, 17 F.3d at 1110 ("The elements of the plaintiff's prima facie case are . . . present and the evidence is sufficient to allow a reasonable jury to reject the defendant's non-discriminatory explanations. The 'ultimate question' of discrimination must therefore be left to the trier of fact to decide."); *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993) (noting that a defendant in an employment discrimination case can obtain summary judgment "in one of two ways. He can demonstrate that the plaintiff's proffered evidence fails to establish a prima facie case, or, if it does, the defendant can present evidence that provides a legitimate nondiscriminatory explanation about which the plaintiff does not create a factual dispute.") (emphasis added); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) ("If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed."); *Sheridan*, 100 F.3d at

1068 (stating that the position taken by the Equal Employment Opportunity Commission ("EEOC") as amicus curiae comported with its holding).

Defendants have no real basis for their petition for writ of certiorari.

The *Hicks* Court held that, under the proper understanding of the *McDonnell Douglas* framework,

> the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993).

Thus, the Supreme Court established that, when presented with sufficient evidence to find both that the plaintiff has made a *prima facie* case and that the employer's proffered nondiscriminatory reasons for the challenged actions were not credible, the factfinder can properly find that the defendant employer has intentionally discriminated against the plaintiff. The Court repeated this principle twice more in the sentence following the one quoted above, saying: "Rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination," and: "Upon such rejection, no additional proof of discrimination is required," *id.* (footnote, citation, and internal quotation marks omitted), and then once more in a footnote: "Rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination. . . ." (*Id.*, at 511, n.4.)

Finally, as the Court stated in *Combs v. Meadowcraft, Inc.*, 106 F.3d 1519 (11th Cir. 1997):

> The upshot of *Hicks* and the *Howard* line of decisions is that a defendant cannot win judgment as a matter of law merely by proffering nothing but false nondiscriminatory reasons for its actions. The justification for that rule is closely analogous to the justification for the mandatory presumption of discrimination that initially accompanies a plaintiff's prima facie case. As then-Justice (now Chief Justice) Rehnquist pointed out long before the Hicks decision, we require a defendant, on pain of losing the case, to come forward with explanations for its actions once a plaintiff has made out a prima facie case of discrimination, "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2949-50, 57 L. Ed. 2d 957 (1978). Justice Rehnquist further explained:
>
> "[W]e are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race."

Combs v. Meadowcraft, Inc., 106 F.3d 1519, 1537 (11th Cir. 1997) (*citing to Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2949-50, 57 L. Ed. 2d 957 (1978)).

II.

THE COURT OF APPEALS PROPERLY REVIEWED THIS CASE *DE NOVO* AND CORRECTLY REVERSED THE DISTRICT COURT'S HOLDING WHERE THE DISTRICT COURT FAILED TO APPLY THE PROPER STANDARD OF REVIEW BY REQUIRING THE PLAINTIFF TO PRODUCE DIRECT EVIDENCE OF DISCRIMINATION.

This case was initially dismissed by the Court on Defendants' motion for summary judgment. The Court of Appeals reviews the District Court's grant of summary judgment *de novo*. The appellate court is required to apply the same test the district court should have utilized initially. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3rd Cir. 1987).

In the instant case, the District Court failed to apply the proper standard and instead, required the Plaintiff to provide direct evidence of discrimination. (*See* Court of Appeals Opinion, at Appendix, pg. 6a: "The transcript of the hearing makes clear that the district court was troubled by Reese's failure to introduce any direct evidence that Sabir was treated differently or more favorably than Reese. . . .")

The Court of Appeals found the District Court erred and then proceeded to review this case pursuant to the burden-shifting proof scheme in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (*See* Court of Appeals Opinion, at Appendix, pg. 7a-10a).

Again, as more fully discussed above, the Defendants misstate the Court of Appeals holding. The Court of Appeals held that the Defendants failed to provide a legitimate nondiscriminatory reason for their actions, and as such, failed to satisfy their burden of production:

> Because the defendants have provided no other legitimate, nondiscriminatory explanation for why Reese was not given an application when Sabir was able to obtain one with relative ease, Reese is entitled to present his full case to a trier of fact.
>
> [FN2] In so holding, we express no opinion at to the actual merits of Reese's case . . . We merely hold that given the state of the record in this case, the question of what really happened to Reese must be resolved by the trier of fact. (Court of Appeals Opinion, Appendix, pg. 10a)

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari and affirm the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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